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No. 93-___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RELIGIOUS TECHNOLOGY CENTER, CHURCH OF SCIENTOLOGY INTERNATIONAL, and CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT, ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE, STEVEN BISBEY, ADVANCED ABILITY CENTER CANDACRAIG, ADVANCED ABILITY CENTER EAST GRINSTEAD, CHURCH OF THE NEW CIVILIZATION, HARVEY HABER, JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,

Real Parties In Interest–Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether mandamus is a proper remedy to correct a district court's abdication of is Article III jurisdiction to a special master on fundamental issues and claims in the case, as has been held by several other circuit courts?

2. Whether a district court unlawfully abdicates its Article III jurisdiction to a special master by permitting a special master to decide fundamental issues and claims in the case, including dismissal of the plaintiffs' claims and awarding of attorneys' fees, where the district court never reviews critical orders and recommendations of the special master and merely rubber stamps other dispositive orders and recommendations, without written or oral analysis, and without hearing or even meeting with the parties?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Religious Technology Center, the Church of Scientology International, and the Church of Scientology of California petition for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit denying petitioners' request for writ of mandamus.

Opinions Below

The order of the court of appeals denying the petition for writ of mandamus (1a) is unreported. The order of the district court appointing a special master (3a) is unreported. The orders of the district court summarily approving orders of the special master (12a-32a) are unreported.[1]

Jurisdiction

The order of the court of appeals (1a) was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Provisions Involved

Article III, § 1 of the Constitution of the United States provides:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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[1] Other decisions of the district court and the court of appeals in this case, not directly raised by this petition, are reported as follows: *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Religious Technology Center* v. *Scott*, 660 F. Supp. 515 (C.D. Calif. 1987), *reversed*, 869 F. 2d 1306 (9th Cir. 1989); *Religious Technology Center* v. *Wollersheim*, 971 F. 2d 364 (9th Cir. 1992).

Statement

1. The underlying basis and early history of this lawsuit are set forth in the reported decisions of the court of appeals, *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), and of District Judge Pfaelzer, *Religious Technology Center* v. *Scott*, 660 F. Supp. 515 (C.D. Cal. 1987), *revs'd*. 869 F.2d 1306 (9th Cir. 1989). The "case originated in the theft in 1983 by Robin Scott of certain documents belonging to the plaintiff Church of Scientology International ["CSI"]. Plaintiffs and some defendants . . . regard these documents as religious scriptures, embodying part of the advanced technology practiced by Scientologists. In particular, the documents stolen included a series of bulletins describing a procedure known as 'New Era Dianetics for Operating Thetans,' 'NED for OTs' or 'NOTs'." *Scott*, 660 F. Supp. at 516. The theft occurred in Denmark, and "Danish authorities subsequently convicted Scott of burglary. While the stolen materials were returned, the Church maintains that copies were made and that [the defendants in this case] later acquired these copies" and used them to pass themselves off as providers of authorized Scientology religious services. *Wollersheim*, 796 F.2d at 1078.

Plaintiffs filed suit on January 31, 1985 in the Central District of California, naming as defendants not only Scott and his confederates in Europe, but also several United States-based former Scientologists (the "Mayo defendants"), including David Mayo and the Advanced Ability Center ("AAC"). The complaint alleged that AAC was run by the Mayo defendants as a center for the provision of services based upon distorted versions of Scientology writings and materials, both confidential and non-confidential, without approval of the hierarchical Church of Scientology.[2]

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[2] In October, 1985, a related lawsuit was filed against additional defendants for receiving and using the materials. The two cases were consolidated.

The complaint further alleged that the Mayo defendants had conspired and/or acted in concert with the Scott group to share and exploit the stolen documents, which had been written by L. Ron Hubbard, the founder of the Scientology religion, and constituted the most confidential and sacred services in the Scientology religion. The action alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and of common law and statutory trade secrets laws. The case was assigned to District Judge Pfaelzer, who, on July 15, 1985, denied the defendants' motion to dismiss the complaint. In August 1985, the Mayo defendants filed an answer and counterclaims alleging RICO violations, unfair competition, intentional infliction of emotional distress, antitrust violations, false designation/false description claims, and libel.

Late in 1985, the plaintiffs sought a preliminary injunction against wrongful exploitation of their stolen scriptures. In opposing the motion, the defendants claimed that Mayo was the principle author of the original Scientology documents, not L. Ron Hubbard, and that he therefore was able to and did write the new materials from memory. Judge Pfaelzer conducted a two day evidentiary hearing, after which she rejected Mayo's testimony as not credible[3] and found that the AAC materials were substantially identical to the plaintiffs' stolen materials. Judge Pfaelzer therefore preliminarily enjoined the defendants from "using, distributing, exhibiting or in any way publicly revealing" any version of certain enumerated higher level Church of Scientology materials.[4]

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[3] In a subsequent proceeding in this case, Judge Pfaelzer reemphasized that "This Court did not find Mayo to be a credible witness." *Religious Technology Center* v. *Scott*, 660 F. Supp. at 517-18.

[4] On appeal, the court of appeals reversed, holding, somewhat reluctantly, "that Congress did not intend to give private RICO plaintiffs any right to injunctive relief." *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076, 1088.

Thereafter, the estate of L. Ron Hubbard "registered a copyright in the NOTs materials with the United States Copyright Office . . . [and subsequently] executed a license agreement granting plaintiff Religious Technology Center ('RTC') an exclusive license to reproduce, distribute, and utilize NOTs . . . On December 5, 1986, [Judge Pfaelzer] granted plaintiffs leave to file an amended complaint stating a new claim for copyright infringement." *Religious Technology Center* v. *Scott*, 660 F. Supp. at 517. Plaintiffs also now alleged economic harm from defendants' actions. On December 15, 1986 and February 27, 1987, Judge Pfaelzer denied defendants' motions for summary judgment and to dismiss the old and the amended complaints.

2. On May 24, 1989, Judge Pfaelzer unexpectedly recused herself from the case and transferred it directly to District Judge James M. Ideman. Judge Ideman immediately appointed as Special Master James G. Kolts, a retired Superior Court Judge (3a). Judge Ideman gave Special Master Kolts plenary power over all pretrial aspects of the cases, putatively reserving review of Special Master Kolts' rulings to the district court. The Churches' petition for a writ of mandamus to vacate the appointment was denied on June 27, 1990.

Special Master Kolts then began to preside, essentially for all purposes. Judge Ideman never met with the parties or counsel, never held a conference, never heard oral argument, never conducted an evidentiary hearing, and never wrote a word of analysis concerning the ultimate factual or legal issues involved in this case.

Special Master Kolts' first act was to issue an opinion recommending dismissal of the RICO claims, in the face of Judge Pfaelzer's holding that plaintiffs had stated a valid RICO claim. On March 7, 1990, Judge Ideman signed a boilerplate "Order Adopting Findings, Conclusions and Recommendations of Special Master Re RICO and Pendent Claims," which merely stated, "The Court has reviewed the Reports and Recommen-

dations of the Special Master . . . [and] hereby adopts the Reports and Recommendations of the Special Master . . ." (12a-13a).

A similar pattern was followed by Judge Ideman in adopting in boiler-plate fashion the special master's "recommendations" denying plaintiffs' motions for summary judgment seeking dismissal of the defendants' counterclaims for intentional infliction of emotional distress and libel (14a, 16a). No attempt at analysis was essayed in either instance.

With respect to several other motions potentially dispositive of various claims, Judge Ideman withheld decision on plaintiffs' objections to the special master's recommendations for periods ranging up to nearly two years, before ultimately summarily denying the objections as moot in light of his Rule 37 dismissal of all of plaintiffs' claims.[5] This failure to address objections to the special master's rulings played a decisive role in the final resolution of the plaintiffs' claims, because the special master then treated (and was permitted to treat) his unreviewed "recommendations" as if they were binding rulings, and to impose dispositive sanctions upon plaintiffs for not complying with recommendations which putatively were under review by the district judge. When the special master finally "recommended" dismissal of plaintiffs' claims in their entirety, the district court rubber stamped that recommendation and then dismissed as "moot" plaintiffs objections to the earlier "recommendations" upon which the ultimate sanction orders were based.

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[5] Thus, plaintiffs timely objected to the special master's November 20, 1990 denial of their motion for partial summary judgment establishing that Mr. Hubbard was the author of the NOTs materials; likewise, they timely objected to Special Master Kolts August 20, 1991 dismissal of their breach of contract claim; likewise they timely objected to his April 26, 1991 order imposing against them "issues" sanctions on the authorship issue for failure to provide discovery. None of these objections were decided on the merits, but instead were dismissed on August 28, 1992 as moot (20a) following Judge Ideman's July 30, 1992 order (18a) approving Special Master Kolts' "recommendation" of dismissal of all of plaintiffs' claims under Rule 37, F.R. Civ. P.

The failure of the district court to rule in a timely fashion on the special master's order of April 26, 1991 imposing "issues" sanctions for failure to provide discovery dramatically highlights the district judge's abdication of his responsibilities. On April 3, 1990, the special master ordered the plaintiffs to produce all notes in their possession concerning the creation of the NOTs materials, which assertedly was relevant on the question of the extent of Mayo's role, if any, in that process. Plaintiffs had submitted declarations that there were no such notes in their possession or control other than what already had been produced and the tapes and transcripts of L. Ron Hubbard creating the materials, which had been sealed in the district court's file since December 20, 1988. Defendants relied on the declarations of Mayo (who had been found to be not credible on this very subject by Judge Pfaelzer) and of Vicki Aznaran, a litigant seeking millions of dollars in damages from these plaintiffs in another proceeding, in arguing that plaintiffs had additional materials. The special master, without holding a hearing or reviewing the tapes already lodged with the court which preserved the authorship process, resolved this dispute in defendants' favor in ordering the plaintiffs to produce.

The district court summarily approved the discovery order on May 7, 1990, without hearing or argument (23a). For the first time, the district court devoted two sentences to plaintiffs' arguments:

> The Court finds that the Special Master's discovery order is not burdensome or improper because the Special Master only directs plaintiffs . . . to respond to defendants' discovery requests to the extent plaintiffs . . . have custody or control over the documents requested. Moreover, if plaintiffs . . . have already complied with defendants' discovery requests, plaintiffs . . . are in compliance with the Special Master's discovery order.

(23a-24a). This admonition, however, subsequently was repeatedly ignored by the special master, and the district court never again acknowledged plaintiffs' arguments with respect to it in

subsequent objections to the special master's discovery and sanctions orders.

On July 25, 1990, the special master further ordered plaintiffs to produce documents in discovery on matters relating to the issue of the scriptural authorship issue and to defendants' antitrust counterclaim. Plaintiffs had objected to these requests on essentially two grounds: (1) With respect to certain documents, they either did not exist or plaintiffs did not have possession or control over them; (2) the discovery on the authorship and antitrust issues was highly intrusive into the Churches' ecclesiastical doctrine, structure, and governance, and should therefore at least be stayed pending determination by the special master and the court of plaintiffs' motions for partial summary judgment on issues of authorship of the materials, the work-for-hire doctrine, and the antitrust counterclaims. These objections to the special master's July 25, 1990 discovery order were raised to the district court. In response, on October 31, 1990, Judge Ideman continued consideration of the objections until determination of the pending motions.[6]

On March 1, 1991, defendants moved to dismiss plaintiffs' claims as a sanction under Rule 37, F.R. Civ. P., for plaintiffs' failure to comply with discovery. Plaintiffs had not provided additional discovery pursuant to the special master's April 3 and July 25, 1990 discovery orders, for two reasons: (1) they did not possess or control any additional documents responsive to the April 3, 1990 order, and thus could not produce them, as recognized in Judge Ideman's May 7, 1990 order; (2) they had objected to the July 25, 1990 order on the basis of the pending partial summary judgment motions, one of which had been granted and the others of which were still pending,[7] and Judge Ideman had deferred consideration of their objections.

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[6] Indeed, on October 18, 1990, the special master had recommended *granting* the plaintiffs' summary judgement motion on the antitrust claims, thereby seemingly mooting a good portion of defendants' discovery requests.

[7] On June 4, 1991, Special Master Kolts recommended granting plaintiffs' summary judgment motion that Mayo's contribution to NOTs, if any, was

Nevertheless, on April 26, 1991, Special Master Kolts, while denying defendants' motion to dismiss, imposed issue-related sanctions on the authorship issue, to wit, that plaintiff Mayo had "substantial participation in the drafting of NOTs." This sanction was based exclusively on the Special Master's conclusion, *without holding a hearing* and in the face of contrary declarations by plaintiffs, that plaintiffs possessed and controlled, or had destroyed, relevant documents. Plaintiffs timely filed their objections to this sanctions order, which was held by Judge Ideman for over one year and never ruled upon on the merits.

On August 13, 1991, Judge Ideman denied the plaintiffs' objections to the special master's discovery order of July 25, 1990 (25a), despite the fact that the plaintiffs had already won dismissal of the antitrust counterclaim (defendants filed no objection), and had won the work-for-hire authorship issue (at least pending the district judge's determination of the defendants' objections). The reason given by Judge Ideman for doing so was that: "plaintiffs have been extremely evasive with respect to their discovery obligations . . . [and] are already in violation of several Court orders . . . In fact, discovery responses by plaintiffs in this case have either been incomplete or inadequate" (26a).

At the time of this ruling, the *only* finding that plaintiffs had improperly withheld discovery was the special master's April 26, 1991 order of issue-related sanctions. As noted, the district court had not and never did rule on plaintiffs' objections to that order. By so predicating its August 13, 1991 order on the special master's unreviewed sanctions order of April 26, 1991, the district court afforded conclusive effect to the special master's sanctions order. Moreover, the district court previously had postponed consideration of plaintiffs' objections to the special master's July 25, 1990 discovery order pending determination

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on a work-for-hire basis. Defendants objected to this order, and, once again, Judge Ideman held it for over one year and never ruled upon it on the merits, ultimately denying it as moot.

of the partial summary judgment motions. The district court, in its August 13, 1991 order, thus denied and refused to rule on the merits of those objections on the basis that plaintiffs, relying in part on the district court's order of continuance, had held back compliance pending the district judge's ruling on the motion. In this way, the district court further gave final and conclusive effect to the special master's rulings without subjecting them to Article III consideration on the merits.

4. Following Judge Ideman's order of August 13, 1991, defendants filed a new motion to dismiss the plaintiffs' claims in their entirety as a Rule 37 discovery sanction. The special master promptly granted it, relying principally on two factors: (1) his prior issues-oriented sanction motion, which, as we have shown, was based upon the special master's resolution of disputed facts without holding a hearing, *and which had never been and never was reviewed by the district judge*; and (2) plaintiffs' failure to produce documents while the partial summary judgments were being considered (and ultimately won by plaintiffs). With respect to the latter, once again, plaintiffs had sought district court review of the special master's decision that such documents had to be produced whether or not the underlying claims survived, and, once again, the district court never decided the issue on the merits.

The district judge summarily approved the special master's Rule 37 dismissal order without discussion of the factual or legal issues (18a). In this way, the special master's earlier unreviewed orders became the predicate for the dismissal of plaintiffs' claims.

5. Defendants then filed a motion seeking attorneys fees of nearly $2.9 million. Despite the fact that plaintiffs had prevailed on numerous issues and at various stages of the litigation, and despite the fact that plaintiffs raised substantial factual issues about the fee request, the special master granted the request, in its entirety, without permitting plaintiffs discovery and without holding an evidentiary hearing. The district

judge approved the order, without change or modification, without hearing or oral argument, and without writing an explanation addressing the legal or factual issues involved. In fact, the district judge merely affixed his signature to the proposed order submitted by defendant's counsel, crossing out the word "proposed" and otherwise changing not a jot or comma (28a).

6. Plaintiffs petitioned for writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The petition was opposed by defendants, principally on the ground that under Ninth Circuit law, mandamus is not appropriate unless the issue raised can never be raised by appeal. See *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977). Judge Ideman's response to the petition was to announce that he was recusing himself from further proceedings in the lawsuit, *i.e.*, the adjudication of defendants' counterclaims.

While one panel of the Ninth Circuit had specifically required defendants and requested Judge Ideman to respond to the petition, a second panel summarily denied the petition without comment (1a), presumably on the basis of the *Bauman* case.

REASONS FOR GRANTING THE WRIT

This case raises the question of whether mandamus relief is available to a party who can show that a district court has abdicated its responsibilities under Article III of the Constitution by permitting a special master to decide fundamental issues of liability, subject only to the district court's *pro forma* rubber stamping of the special master's orders. The Ninth Circuit's decision denying mandamus review of such an abdication of the judicial role is in conflict with the decision of this Court in *LaBuy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), as well as with the decisions of the other circuits which have addressed the question. *See, In re Bituminous Coal Operators Association*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987); *Prudential Insur-*

ance Company v. *United States Gypsum Company*, 991 F.2d 1080, 1083 (3rd Cir. 1993).

Moreover, the Ninth Circuit's inflexible adherence to its *Bauman* rule in cases such as this results in a fundamental undermining of the *traditional* role of mandamus review, *i.e.*, to restrict a district court to its jurisdiction or to compel it to exercise its Article III jurisdiction in circumstances where it has abdicated its constitutional and statutory role. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Will* v. *United States*, 389 U.S. 90, 95 (1967). Mandamus has always been available in such circumstances, despite the fact that the district court's jurisdictional error is ordinarily correctable on appeal.

Finally, the case addresses a problem which has appeared with disturbing frequency in recent years, *i.e.*, district court abdication of judicial duties to a special master. Several courts of appeals have addressed the problem, and have held that a district court may not rubber stamp the decisions of a special master on important issues in the case. *See, e.g., In re Bituminous Coal Operators Association, supra; In re United States, supra; Burlington Northern Railroad Co.* v. *Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991); *Stauble* v. *Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992). It is appropriate and necessary for this Court to provide overall guidance on the question, and to insure that courts of appeals utilize their mandamus powers to correct district court abdications of their Article III roles.

I. MANDAMUS IS THE PROPER REMEDY WHERE A DISTRICT COURT ABDICATES ITS ARTICLE III JURISDICTION TO A SPECIAL MASTER, AS SEVERAL OTHER COURTS OF APPEALS HAVE HELD

While the use of the peremptory writ of mandamus has always been reserved for "exceptional circumstances," *Will* v. *United States* 389 U.S. 90, 95 (1967), it "traditionally" has been available when a district court has either usurped juris-

diction or failed to exercise jurisdiction conferred upon it. *Id.* Indeed, the core of the mandamus power historically has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). See *De Beers Consol. Mines Ltd.* v. *United States*, 325 U.S. 212, 217 (1945); *Ex Parte Peru*, 318 U.S. 578 (1943).

While this court has emphasized that use of the writ is not restricted to "technical definition[s]" of jurisdiction, *Will* v. *United States*, 389 U.S. at 95, and even has permitted use of mandamus to permit the courts of appeals to supervise the administration of justice in the district courts, *La Buy* v. *Howes Leather Co.*, 352 U.S. 104 (1964); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), these latter cases must be seen as growing out of the fundamental core of mandamus jurisdiction—to prevent judicial "usurpation" or abdication of power. *De Beers Consolidated Mines, Ltd.*, 325 U.S. at 217. Viewed in this perspective, *La Buy* authorized the use of the writ against an improper referral to a special master precisely because the district court had failed to exercise its jurisdiction as an Article III court.

Numerous courts of appeals, both prior to and following *La Buy*, have granted mandamus to correct improper use of a master. In *In re Bituminous Coal Operators Association*, 949 F.2d 1165 (D.C. Cir. 1991), the District of Columbia Circuit "grant[ed] the writ . . . because [the district judge] has no discretion to impose on parties against their will 'a surrogate judge,' a substitute from the private bar charged with responsibility for adjudication of the case." 949 F.2d at 1168, citing *La Buy*. Similarly, the Sixth Circuit recently reiterated its view that mandamus is warranted "where the interlocutory order at issue 'deprives the parties of a trial before the court on the basic issues involved in the litigation.' " *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987), quoting from *Vickers Motors, Inc.* v. *Wellford*, 502 F.2d 967, 968 (6th Cir. 1974), and

La Buy. The Third Circuit recently came to a similar conclusion in *Prudential Insurance Company* v. *United States Gypsum Company*, 991 F.2d 1080, 1083 (3rd Cir. 1993). See also *Arthur Murray Inc.* v. *Oliver*, 364 F.2d 28 (8th Cir. 1966) (mandamus granted to correct improper reference to master, relying on *La Buy*); *In re Watkins*, 271 F.2d 771, 773 (5th Cir. 1959) (same; mandamus proper "where the reference to a Master is 'so palpably improper' that the rules have been practically nullified' "); *United States* v. *Kirkpatrick*, 186 F.2d 393 (3rd Cir. 1951) (pre-*La Buy* case; mandamus petition, relief granted); 5A Moore, *Moore's Federal Practice*, ¶ 53.05(3), pp. 53-71, 2 (1992 ed.)

Indeed, the case law supporting the use of mandamus to correct improper reference to or use of a master is analogous and equivalent to the clear body of law holding that mandamus must be permitted "where necessary to protect the constitutional right to trial by jury." *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 472 (1962); *Wilmington Trust* v. *United States District Court*, 934 F.2d 1026, 1028 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1578 (1992). In both instances, the office of the writ is to ensure that the parties may present their case to the individual or body specified by the Constitution; in both instances, the court of appeals acts to correct a usurpation or abdication of judicial power by the district court.

Perhaps in reaction to an overuse of the writ as a "supervisory" device, the Court of Appeals for the Ninth Circuit has developed a set of five criteria to govern the issuance of mandamus:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires. . . .
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.). . . .

(3) The district court's order is clearly erroneous as a matter of law. . . .

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . .

(5) The district court's order raises new and important problems, or issues of law of first impression. . . .

Bauman v. *United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted). These criteria have become the standard by which petitions for mandamus are measured in the Ninth Circuit. *See, e.g., National Org. for the Reform of Marijuana Laws* v. *Mullen*, 828 F.2d 536, 542 (9th Cir. 1987).

It is readily apparent that at least several of the *Bauman* criteria—such as the presence of novel questions or oft-repeated error—were directed at the use of supervisory mandamus. Others, such as the availability or non-availability of an appellate remedy, often are in conflict, and were not previously deemed to offer sure signposts to the availability of the writ. Most significantly, the *Bauman* criteria make no mention of the traditional grounds for mandamus: a usurpation or abdication of Article III jurisdiction or power by the district court. While the intention of the Ninth Circuit to protect against an overgenerous use of the writ was perhaps laudable, the effect has been to make mandamus often virtually unobtainable in the traditional contexts in which the writ historically was used. Thus, for example, when a district court acts beyond its jurisdiction or abdicates its judicial responsibilities, the aggrieved party can usually appeal, if not immediately then at some point in the proceedings, and the error may not be common or, alternatively, raise a novel and important question. Under the *Bauman* rules, mandamus almost certainly would not be available to correct such a usurpation of or failure to exercise jurisdiction. That, of course, was precisely what the court of appeals held in this case.

The Ninth Circuit thus has established a rule contrary to *La Buy* and to the historical use of mandamus. Its decision in this case is a direct conflict with the views of the other circuits which have held that mandamus is the proper remedy where a district court improperly delegates its authority to a special master. *See, e.g., In re Bituminous Coal Operators Association, supra; in re United, States, supra; Prudential Insurance Company, supra.*

Certiorari should be granted both to resolve the conflicts among the circuits on the specific question of the availability of mandamus where a district court improperly delegates authority to a special master, and also to preserve the traditional function of mandamus jurisdiction, to restrict a district court to its jurisdiction or to compel it to act within its jurisdiction.

II. THIS PETITION PRESENTS THE QUINTESSENTIAL CASE OF A DISTRICT COURT'S ABDICATION OF ITS JUDICIAL ROLE TO A SPECIAL MASTER, IN VIOLATION OF ARTICLE III OF THE CONSTITUTION

A. A District Court May Not Delegate to a Master Its Responsibility to Hear and Decide Fundamental Issues of Liability.

Article III judges are given lifetime tenure, and a fixed irreducible compensation for their services "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government," *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982), as well as from the tides of public opinion and passion. Hamilton, *The Federalist Papers*, No. 78, p. 489 (H. Lodge ed. 1888). "The inexorable command of this provision is clear and definite. The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, 458 U.S. at 58-59.

Accordingly, all efforts by Congress or the federal courts to transfer or delegate judicial authority to "judges" or officials not possessing the "attributes prescribed in Article III" must be closely circumscribed. To be sure, there are contexts where some portion of the judicial power constitutionally has been lodged in administrative agencies, magistrates, bankruptcy judges, and even special masters. But the federal courts have recognized that at least with respect to "private rights disputes," such as the instant case, which "lie at the core of the historically recognized judicial power," *Northern Pipeline*, 458 U.S. at 70, Article III courts must play the decisive role in the adjudicatory process.

Thus, for example, while administrative agencies may adjudicate "initial factual determinations" involving "the adjudication of congressionally created rights," *Northern Pipeline*, 458 U.S. at 78, the federal courts must retain and exercise "the essential attributes of the judicial power," *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), including meaningful review of the factual record and *de novo* review of the law. *Id.* at 44-45, 48; *Northern Pipeline*, 458 U.S. at 78. And where the rights at stake are not exclusively of congressional derivation, or where Congress has granted original Article III jurisdiction over disputes concerning congressionally created rights, the power to encroach upon the exercise of traditional judicial functions by Article III courts is even less. *Id.* at 83-84.

In upholding the Federal Magistrates Act, 28 U.S.C. § 636(b), the Court emphasized that "[t]he authority—*and the responsibility*—to make an informed, final determination . . . remains with the judge," *United States* v. *Raddatz*, 447 U.S. 667, 682 (1980), who must exercise *de novo* review of all *facts* and law. Where Congress delegated such essential functions to non-Article III bankruptcy judges to adjudicate private rights disputes, the Court declared the scheme to be unconstitutional under Article III. *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, *supra*. The Court in *Northern Pipeline* emphasized the difference between the constitutional delegations of power

upheld in *Crowell* and *Raddatz* and the unconstitutional grant of power to non-Article III bankruptcy judges struck down in *Northern Pipeline*, 458 U.S. at 84-86.

The same distinctions emphasized in Northern Pipeline have long been applied to limit the extent to which federal courts may use special masters to determine matters committed to the Article III jurisdiction. Over a century ago, the Court described the historical limited role played by a master:

> A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it . . . The information which he may communicate by his findings in such cases . . . is merely advisory to the court which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence.

Kimberly v. *Arms*, 129 U.S. 512, 523 (1889). The Court warned that, in the absence of agreement by the parties:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him . . . [or] abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.

Id., 129 U.S. at 524.

Rule 53, Federal Rules of Civil Procedure, reflects the concerns expressed in the *Kimberly* case. The Rule explicitly provides that reference to a master must be "the exception and not the rule," Rule 53(b). A master may be appointed to assist a jury in its fact finding "when the issues are complicated;" otherwise, a reference may be made only when "some exceptional condition requires it." *Id.* Considerations such as the complexity of a case and a crowded court docket do not constitute an "exceptional condition" which would justify appointment of a master:

> [C]ongestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception. Petitioner—[also] alleges that [reference to a master is justified where there exists] unusual complexity of issues of both fact and law. But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis . . . Nor does Petitioner's claim of the great length of time these trials will require offer exceptional grounds.

La Buy v. *Howes Leather Co.*, 352 U.S. 249, 258-59 (1957). *Accord, Burlington Northern Railroad Co.* v. *Department of Revenue*, 934 F.2d 1064, 1073 and n.5 (9th Cir. 1991) ("Indeed, it is almost impossible to justify the appointment of a master based only on `judicial efficiency'"); *In re United States*, 816 F.2d 1083 (6th Cir. 1987); *Stauble* v. *Warrob, Inc.*, 977 F.2d at 690, 694 (1st Cir. 1992); *Prudential Insurance Company* v. *United States Gypsum Company*, 991 F.2d 1080 (3rd Cir. 1993)

Even where an exceptional condition might justify referral to a master on collateral issues, there are certain core judicial functions which a federal court must reserve to itself. For example, it is not ordinarily proper to refer a case to a master for "determination of the legal sufficiency of the complaint," 5A James W. Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-77 (1992 ed.); for "[t]he handling of the preliminary motion practice," *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 361 (7th Cir. 1972); for determination of a motion for preliminary injunction, *Liptak* v. *United States*, 748 F.2d 1254 (8th Cir. 1984); or for decision of summary judgment motions, even in complex antitrust litigation, *Jack Walters and Sons, Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 712-3 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984).

More broadly, no condition, exceptional or otherwise, can justify referral to a master of the merits of a dispute:

> Because determining a fundamental question of liability goes beyond mere assistance and reaches the essential judicial function identified by Article III, Rule 53 does not allow the responsibility for making such judgments to be delegated to masters (or other persons not of Article III stature) in the face of a contemporaneous objection.

Stauble v. *Warrob*, 977 F.2d at 695. *Accord, In re Bituminous Coal Operators' Association, Inc.*, 949 F.2d 1165 (D.C. Cir. 1991) (the district judge must "reserve for himself, and not delegate to the special master, the core function of making dispositive rulings, including findings of fact and conclusions on issues of law"); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987) (granting mandamus because the district court's reference of potentially dispositive motions violated the litigants' "right to have the basic issues heard by the district judge"). Indeed, in *Burlington Northern R.R.* v. *Dept. of Revenue*, 934 F.2d at 1072, the Ninth Circuit itself reversed a judgment because of the district judge's "wholesale reference of the entire case to a master," and warned that "we can think of no circumstances to justify so extreme a delegation of judicial power as occurred here." *Id.* at 1073. *Cf., Jack Walters and Sons, Corp.* v. *Morton Building, Inc., supra.*

Even if it were possible to posit certain extraordinary circumstances which might justify initial referral of potentially dispositive motions and issues to a master for recommendations, the responsibility remains upon the district judge to carefully review the facts and law, and to render his own decision. The district court must "decide *de novo*, without deferring to a special master, all potentially dispositive questions of fact or law." *In re Bituminous Coal Operators Assn.*, 949 F.2d at 1169. The "mere 'laying on of hands' by a district judge who adopts a magistrate's or master's recommendation of liability *pro forma* cannot inoculate a proceeding against the pathology that invariably follows from noncompliance with Article III."

Stauble v. *Warrob*, 977 F.2d at 696. The district court "must respond to the particular facts of the case and address any objections to the recommendations made by the parties." 5A Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-76 (1992 ed.), citing *Kieffer* v. *Sears, Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989) (district court must hold hearing when party files objections to master's report); *Vekamaf Holland B.V.* v. *Pipe Benders, Inc.*, 671 F.2d 1185 (8th Cir. 1982) (district court must respond to facts of case and set forth its reasons).

The point was made most emphatically in the Ninth Circuit's decision in *Burlington Northern*. In reversing a district court judgment confirming the recommendations of a special master, the court found that:

> the district court acted as a "mere rubber stamp" for the findings and conclusions of the master. Although the court received memoranda from the parties, in its order it provided no substantive explanation for affirming.

934 F.2d at 1074. See also *id.* at 1072 ("the district court's 'rubber stamp' of the master's order is an inexcusable abdication of judicial responsibility and a violation of Article III of the Constitution"); *Stauble* v. *Warrob*, 977 F.2d at 697 ("The district court adopted the master's report without a hearing, without any stated analysis of the evidence, and without any discussion of the master's legal conclusions").

B. The District Court in this Case Improperly Delegated Authority to the Special Master to Hear and Consider Fundamental Determinations of Liability: Permitted the Special Master to Resolve Controverted Issues of Fact and Credibility on the Basis of Papers, Without a Hearing; and Consistently Rubber Stamped the Findings of Fact and Conclusions of the Special Master

"Like the bark of a dog to Sherlock Holmes, . . . the indicia of independent review are telling in this case by their absence."

Stauble v. *Warrob*, 977 F.2d at 696-697. Indeed, we have found no case in which a district court has so utterly and consistently abdicated its judicial role.

This pattern was manifest from the very beginning of the referral. As we have noted, prior to the transfer of this case directly to Judge Ideman, Judge Pfaelzer and the court of appeals had upheld the sufficiency of the RICO allegations in plaintiffs' complaint. See *Religious Technology Center* v. *Wollersheim*, 796 F.2d 1076, 1080 (9th Cir. 1986). Immediately upon receiving the case, Judge Ideman *sue sponte* referred the question of the sufficiency of the RICO allegations to the special master.[8] The special master then issued a "recommendation" rejecting the prior determinations of Judge Pfaelzer and calling for the dismissal of the RICO claims. Judge Ideman summarily rubber stamped this "recommendation" without holding oral argument or writing a word of analysis (12a). Thus, the special master not only decided a fundamental issue of liability under the case, but was permitted to overturn the prior decisions of an Article III district judge.

Throughout the litigation, Judge Ideman followed the same pattern of rubber stamping the "recommendations" of Special Master Kolts, without holding a hearing or oral argument and without delivering an opinion or explanation of his reasons for doing so. Of particular note are the following:

(1) The special master heard and made recommendations granting or denying the parties' motions for partial summary judgment or to dismiss causes of actions or some defendants. In each instance, the district court adopted the special master's report without a hearing, without oral argument, and without a written or oral opinion explaining his reasons, or analyzing the factual contentions and the applicable law (14a, 16a).

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[8] As we have seen, it is particularly inappropriate to refer a "determination of the legal sufficiency of the complaint," to a special master at all, 5A Moore, *Moore's Federal Practice*, ¶ 53.06, p. 53-77 (1992 ed.), let alone without subjecting the master's recommendation to searching review.

(2) The special master ordered the plaintiffs to produce discovery, over their objections that they did not possess or control such documents. In ordering such production, the special master rejected the plaintiffs' objections as being factually false, without holding a hearing to determine the facts or credibility of the plaintiffs' declarants, or the opposing declarants of the defendants. The district court adopted the master's production orders, without hearing or oral argument (23a, 25a).

(3) The special master based his decisions to impose issue oriented sanctions, to dismiss plaintiffs' complaint, and to impose attorneys fees against plaintiffs in major part on his previous discovery and sanctions orders which were never reviewed on their merits by the district court. The district court rotely and without comment or indicia of independent analysis approved these decisions, thereby giving preclusive effect to the special master's unreviewed earlier orders.

(4) Finally, the sanctions orders themselves, which dismissed all of plaintiffs' claims with prejudice and imposed $2.9 million in attorneys fees against plaintiffs, were routinely rubber stamped by the district judge (18a, 28a). No evidentiary hearings on disputed issues of fact were held by either the special master or the district judge. The district judge refused to hear oral argument on any issue, and failed to write a single word of analysis of either the facts or the law underlying the motions. Indeed the special master's initial sanctions order imposing "issues" sanctions was never reviewed by the district judge, although it served as the predicate for all subsequent discovery and sanctions orders.

Even more so than in the *Burlington Northern* case, this record constitutes "an inexcusable abdication of judicial responsibility and a violation of Article III of the Constitution." *Burlington Northern*, 934 F.2d at 1072. *See also, Stauble* v. *Warrob*, 977 F.2d at 697.

This case, and recent similar cases such as *Burlington Northern, Stauble, In re Bituminous Coal, In re United States*, and

Prudential Insurance, demonstrate a disturbing tendency among district court judges to grant broad powers to special masters, without subjecting the actions of the special masters to proper scrutiny. The time is appropriate for this Court to provide nationwide guidance in this troubled area, both assuring that the mandate of Article III is met and removing a source of increasing litigation in the courts of appeals. While this Court should insure that mandamus review is available to correct judicial abdication of Article III powers, elucidation of the standards governing appointment and review of special masters will render such mandamus review unnecessary in most cases.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed July 7, 1993
No. 93-70281
DC# CV-85-711-JMI
Central California (Los Angeles)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

—and—

DAVID MAYO, et al.,

Real-Parties-in-Interest.

Before:

TANG, POOLE and NORRIS,

Circuit Judges.

ORDER

Petitioners' motion for leave to file a reply in support of the petition is granted. The reply shall be filed as of the date received.

The petition for a writ of mandamus is denied. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed September 13, 1989
Case No. CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER APPOINTING SPECIAL MASTER

IT IS HEREBY ORDERED:

The above-captioned consolidated cases consist of a complex litigation concerning RICO, Federal Trademark and Service Mark Infringement, the Sherman Act, the Cartwright

Act and various pendent state claims as well as numerous counterclaims. Due to the complexity of these actions and numerosity of the parties, there have been as many as seven significant motions and six discovery motions pending simultaneously. There have been over 100 depositions and over 90 volumes of court files generated during the four year period of litigation. The parties have filed a very large number of motions, motions for reconsideration and appeals. Motions continue to be made and rulings appear to spawn an ever-greater number of motions. The Court is overburdened with voluminous briefs filed on these various matters. The Court finds itself having to devote a disproportionate amount of time and resources to this case to the detriment of other litigants whose matters are pending before the Court. The Court's resources are finite. Four years into the case, discovery motions continue to pour in; six new discovery motions are presently pending before the Magistrate. These cases have taken a substantial portion of the working time of the District Judge, two magistrates and several law clerks. These cases will continue to dominate the Court's calendar and time and the Court will be devoting a disproportionate and unreasonable share of time and resources to the resolution of these actions.

Also, this lawsuit threatens to become a massive undertaking due to the complexity of issues, great number of witnesses, the estimated trial days and the litigiousness of the parties. The parties estimate the trial to take three months. This trial could thereby require approximately one-third of the Court's trial days for an entire year. Clearly, the Court cannot afford to spend this amount of time on a single trial, without making a serious effort to reduce the trial time. Moreover, this trial would have to be recessed from time to time for priority criminal cases. This case has been pending since 1985 and could be dragged out for over an additional year or longer. Therefore, it is urgent to get the trial estimate down to a reasonable figure.

The Court may properly refer all issues to a Special Master for a hearing and report where potentially substantial economic concerns are involved and where an expeditious reso-

lution of difficult issues is required. *Helene Curtis v. Sales Affiliates*, 199 F.2d 732, 733 (2d Cir. 1952). A trial court may issue an order of reference to a special master *sua sponte*. *In re Josylin's Estate*, 171 F.2d 159, 164 (7th Cir. 1948). The Court is not required to conduct an evidentiary hearing in order to determine whether a Special Master should be appointed. *Gary W. v. Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979). In light of the overburdened calendar of this Court and the time-consuming nature of this case, this Court finds that an exceptional condition exists requiring that certain matters be held under the supervision of a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The Honorable James G. Kolts, Judge of the Los Angeles Superior Court, Retired, be and hereby is appointed as Special Master herein.

2. The Court considers Judge Kolts to be specially qualified to serve in this capacity for the following reasons:

(a) Judge Kolts has had over twenty years of extensive litigation experience as a judge of the Los Angeles Superior Court. Judge Kolts was appointed Judge of the Los Angeles Superior Court in 1969 and was the supervising judge of the criminal division in 1972 and 1973. From 1974 until 1983, Judge Kolts was a civil trial judge handling jury and nonjury cases.

(b) Judge Kolts' previous court service included law and motion, writs and receivers, family law and extensive civil and criminal trial work.

(c) Between 1984 and 1989, Judge Kolts had four three-month assignments to the California Appellate Court, Second District Court of Appeal.

3. Accordingly, the trial court may refer to the Special Master any and all issues arising in an action to which Rule 53 is applicable, whether pertaining to procedural matters or to matters going to the merits. *Chicago, Milwaukee & St. Paul*

Ry. v. Tompkins, 176 U.S. 167 167 (1900); *Faucher v. Lopez*, 411 F.2d 992 (9th Cir. 1969).

The Special Master is empowered and charged with the duty to:

a) *Recommend methods which will expedite litigation, including but not limited to:*

(1) Identifying areas where partial summary judgment would be appropriate;

(2) Obtaining stipulations to uncontroverted facts;

(3) Examining contested issues of fact to ensure that they are in fact contested;

(4) Isolating contested issues of law and making recommendations as to how these disputes should be resolved;

(5) Identifying any matters which could be dealt with by motions in limine and suggesting resolutions of these matters;

(6) Determining which witness testimony appears to be cumulative. Counsel shall prepare for the Special Master's approval a summary of the expected testimony of each witness to help the Special Master identify any cumulative or inadmissible testimony;

(7) Making recommendations on all contested exhibits and testimony. Counsel shall organize their exhibits and witness lists and make the appropriate objections thereto, so as to aid the Special Master in this task;

(8) Obtain stipulations in appropriate circumstances where facts are not in dispute.

b) *To preside over all pretrial matters.*

The Special Master may place the hearings on the record. The Special Master may require the production of evidence on all matters of the case, including the production of all books, papers, vouchers, documents and writings. The Special Master has the authority to subpoena witnesses and call the parties to the action. The Special Master has the authority to put wit-

nesses and parties under oath and may himself examine them. The Special Master may rule on the admissibility of evidence. When a party so requests, the Special Master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury. The Special Master has the authority to supervise and issue recommendations regarding all pretrial matters. The Court will independently review the Special Master's recommendation and the Court may adopt, modify, reject or recommit the recommendation with instructions. Regarding the Special Master's recommended findings of fact and conclusions of law, any party may file objections, responses or comments within ten (10) days of the date of filing of the recommendation. The Court will independently review the Special Master's proposed findings of fact and conclusions of law, and after a hearing the Court may adopt the report or modify it, reject it in whole or in part, may receive further evidence or recommit the report with instructions.

Before filing his report with the Court, the Special Master may submit a draft hereof to counsel of all parties for the purpose of receiving suggestions. The Special Master shall exercise the power to regulate all proceedings in every hearing before him and may do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order. Due to the large numbers of parties involved, if a party fails to appear at a previously scheduled conference or hearing, the Special Master may proceed ex parte or, in his discretion, adjourn and continue the proceeding. The Special Master is directed to make periodic reports to the Court concerning the progress of this litigation.

Any questions or disputes concerning the scope of the Master's authority shall be resolved by motion to the Court.

c) *Superintend and schedule all discovery matters, including the taking of depositions, and to decide all questions and disputes with reference thereto, including the power to determine the scope of discovery, to issue protective orders, to determine whether discovery orders have been complied with,*

and to supervise and order the production and copying of documents and/or records, all in such manner as the Special Master considers will protect the rights of the parties. The Special Master may make recommendations as to whether further discovery should be permitted as well as the scope and duration of discovery.

d) *As to the taking of depositions, the Special Master may fix the time and place thereof, and he shall have the power:*

1) to rule upon the form of any question addressed to a witness;

2) to rule in the first instance on any objection to any question made by or on behalf of any party or a witness, and upon upholding any such objection to disallow the question;

3) to rule in the first instance that answers to any such questions objected to by any party may be taken subject to such objection and preserved until the admissibility of said testimony is determined by the Federal Court litigation before this Court in this Action;

4) to rule in the first instance upon any objection to any question made on the ground that the answer to such question might cause the disclosure of a confidential communication between attorney and client, work product, or any other matter allegedly otherwise protected from disclosure;

5) to rule in the first instance upon all applications made during or in connection with the said depositions under Rules 26, 30, 31, 32 and 34 of the Federal Rules of Civil Procedure;

6) to rule in the first instance on the use at the depositions of any matter produced in discovery under Rule 34 or otherwise;

7) to modify or revoke any Court Order heretofore made and entered limiting discovery, or pertaining to, or related to any discovery problem, including scheduling and including pretrial and pretrial orders and pretrial hearings and all other matters, other than this Order.

e) *Other duties as assigned.*

The above enumeration of powers is not intended as denying to the Special Master any power which is not specifically mentioned. To the contrary, the Special Master shall have, enjoy and exercise all powers allowed to Special Masters under Rule 53 of the Federal Rules of Civil Procedure and all powers necessary and proper to effectuate Rules 26 through 37, and Rule 45(a)-(d) of the Federal Rules of Civil Procedure (popularly called the discovery rules), subject to review as hereinafter provided.

3. Any action taken or ruling made by the Special Master in discovery matters shall be subject to review by this Court upon the application of any party aggrieved by such action or ruling, provided only that such application be made within ten (10) days after the action or ruling of the Special Master of which complaint is made, unless such time shall have been enlarged by the Master for good cause shown.

a) The party seeking review shall, at his, her, or its own expense, provide to the Court a transcript of the proceedings before the Master, if a court reporter was present thereat, together with a concise statement of the issues and contentions with respect thereto and points and authorities.

b) On any matter brought to the Court for review, the Special Master shall furnish to the Court a statement of the problem and the reasons for his action which statement may include the legal basis for his action.

c) When review is sought as to a matter arising in a deposition, the Special Master may in his discretion order completion of the deposition pending review.

d) The Court following independent review of the action taken, or ruling made by the Special Master may adopt, modify, reject or recommit it with instructions.

4. The compensation to be allowed the Special Master for his services shall be fixed by the Court upon motion of the Special Master and shall be paid from time to time as the

Court shall determine. The Special Master's out-of-pocket expenses and administrative expenses, such as court reporter, clerical assistance, research assistance, travel and subsistence, and data processing shall be similarly paid. Within thirty (30) days of the filing of this Order, plaintiffs and defendants shall deposit with the Court an initial sum of $50,000; that is $25,000 from plaintiffs jointly and $25,000 from the defendants jointly. This sum shall serve as an initial fund for this purpose. Said deposit shall be made with the Clerk of the Court, to be deposited in the Registry of the Court in an interest-bearing account to be drawn upon by order of Court, following approval of the request of the Special Master.

The apportionment of the deposit among the parties on each side shall be by agreement among themselves. In the event the parties are unable to agree upon an allocation between and among themselves, any party may move the Court to fix the allocation.

Regardless of the ratio in which deposits are made, the Court may, at the end of the case, assess the compensation and expenses so allowed to the Special Master between the parties as the court shall determine, taxable as costs in this action.

When, in the Special Master's opinion, the services rendered and expenses incurred are sufficient to substantially utilize or exceed the amount of said initial deposit, the Special Master shall advise the Court thereof, and the Court will order additional deposits.

5. One chamber's copy of all documents filed in this action shall be furnished to the care of The Honorable James G. Kolts, 1715 East Altadena Dr., Altadena, California 91001. Said copy shall be clearly marked "Courtesy Copy for the Special Master" and shall be mailed under separate cover from the original and copy of the documents to be filed with the Clerk's Office of the United States District Court, no later than the date of the filing of such papers with the Clerk. A copy of any application for review and of any papers or memoranda in support of or in opposition thereto shall similarly be furnished to the Special Master.

6. The parties shall have ten days within which to object in writing to this Order appointing the Special Master.

IT IS SO ORDERED.

DATED: Sept. 12, 1989

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed May 4, 1990
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California Corporation, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California Corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF SPECIAL MASTER RE RICO AND PENDENT CLAIMS

IT IS HEREBY ORDERED:

1. The Court has reviewed the Reports and Recommendations of the Special Master re Rico and Pendent claims, as

well as the parties' objections to these Reports and Recommendations.

2. The Court hereby adopts the Reports and Recommendations of the Special Master re Rico claims and Pendent claims.

IT IS SO ORDERED.

DATED: May 2, 1990

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed December 2, 1992
CV-85-711; 85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF THE SPECIAL MASTER'S ORDER OF SEPTEMBER 10, 1992 AS TO SUMMARY JUDGMENT MOTION RE: EMOTIONAL DISTRESS

IT IS HEREBY ORDERED:

The motion of plaintiffs Religious Technology Center, *et al.*, for review of Special Master Kolts' Order of 9/10/92 was decided without hearing on November 9, 1992.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law, the Court has concluded that plaintiffs' motion is not grounded in facts or warranted by existing law. Accordingly, plaintiffs' motion is hereby DENIED.

IT IS SO ORDERED.

DATED: December 1, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed January 12, 1993
CV-85-711; 85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF SPECIAL MASTER'S ORDER OF 11/13/92

IT IS HEREBY ORDERED:

1. Having read and considered plaintiffs' motion for review of the Special Master's Order of November 13, 1992 as to Summary Judgment re: libel, defendants' opposition to said motion, and all papers filed in connection thereto, the Court

concludes that such motion is neither grounded in fact nor warranted by law.

The Court finds that triable issues of material exist, as determined by both Special Master Kolts and Judge Pfaelzer, and that summary judgment is improper on the libel counterclaim.

Accordingly, plaintiffs' motion for review of the Special Master's November 13, 1992 Order is HEREBY DENIED.

Defendants' request for sanctions is HEREBY DENIED.

IT IS SO ORDERED.

DATED: January 11, 1993

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed July 30, 1992
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING SPECIAL MASTER KOLTS' ORDER RECOMMENDING DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINTS

IT IS HEREBY ORDERED:

On April 20, 1992, Special Master James G. Kolts filed a Memorandum Opinion in the above-entitled action granting Defendants' motion to dismiss the amended complaints. The

Court construed that Opinion as a recommendation and by Order filed on April 28, 1992, the Court Ordered the parties to show cause why the Court should not adopt Special Master Kolts' Order recommending the dismissal of Plaintiffs' amended complaints.

Having read and considered Plaintiffs' response to the Order to Show Cause, Defendants' opposition thereto, Plaintiffs' Reply in Support of Plaintiffs' Response, and all supporting documents filed therewith, the Court hereby finds that as per the reasons set forth in the Special Master's Memorandum Opinion, a dismissal of the amended complaints is the "only remaining meaningful remedy" for Plaintiffs' misconduct with respect to discovery in this action. Therefore, the Court hereby ADOPTS the Special Master's Memorandum Opinion of April 20, 1992 and DISMISSES Plaintiffs' amended complaints.

IT IS SO ORDERED.

DATED: July 30, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed August 28, 1992
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

ORDER RULING ON ALL PENDING MOTIONS UNDER SUBMISSION

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF SPECIAL MASTER'S ORDER OF JUNE 2, 1992

ORDER DENYING PLAINTIFFS' MOTION TO VACATE SPECIAL MASTER'S ORDER OF APRIL 26, 1991 AS TO JOHN NELSON, HARVEY HABER, DIANA REISDORF AND VIVIEN HARTOG ZEGEL

IT IS HEREBY ORDERED:

By Order entered on July 31, 1992, the Court adopted Special Master Kolts' Order recommending dismissal of Plaintiffs' Amended Complaints in this action. The Court has reviewed the remaining motions which are under submission in the above-entitled action. The Court has determined that the following motions have been rendered MOOT by the dismissal of the First Amended Complaints:

1) Plaintiffs' motion for review of Special Master's Order denying Plaintiffs' motion for partial summary adjudication of issues and specification without substantial controversy on issues concerning authorship and origin of religious scripture and for entry of judgment.

2) Defendants' motion for review of Memorandum Opinion and Order of Special Master dated June 4, 1991 granting Plaintiffs' motion for partial summary judgment concerning authorship and origin of scriptures pursuant to the Copyright Act.

3) Plaintiffs' motion for review of the Special Master's Orders of April 26, 1991 on Defendants' motion to dismiss copyright cause of action and on Order denying Plaintiffs' motion for reconsideration of April 26, 1991 Order and Ordering Rule 11 sanctions.

4) Plaintiffs' motion for review of Special Master's Memorandum Opinion and Order of August 20, 1991 dismissing breach of contract cause of action.

5) Counterdefendant's motion for reconsideration of Court's Order of August 12, 1991 and request for stay.

6) Plaintiffs' Notice of Application and Application for evidentiary hearing for assessment of damages by Court and for entry of judgment by default.

7) Plaintiffs' Renewed Application for evidentiary hearing for assessment of damages by Court and for default judgment.

As to Plaintiffs' motion for review of the Special Master's Order of June 2, 1992, the Court, having read and considered Plaintiffs' motion, Defendants' Opposition thereto, Plaintiffs' Reply and all supporting documents submitted therewith hereby DENIES Plaintiffs' motion.

Finally, Plaintiffs' motion to vacate the Special Master's Order of April 26, 1991 as to John Nelson, Harvey Haber, et al. is hereby DENIED WITHOUT PREJUDICE. That motion deals with issues which are still being considered by the Special Master. As such, the motion is premature and may be refiled when the Special Master has made final rulings.

IT IS SO ORDERED.

DATED: August 28, 1992

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed May 7, 1990
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER ADOPTING SPECIAL MASTER'S APRIL 3, 1990 DISCOVERY ORDER

IT IS HEREBY ORDERED:

The Court hereby adopts the Special Master's April 3, 1990 discovery order. The Court finds that the Special Master's discovery order is not burdensome or improper because the

Special Master only directs plaintiffs and Mr. Norman Starkey ("Starkey") to respond to defendants' discovery requests to the extent plaintiffs and Mr. Starkey have custody or control over the documents requested. Moreover, if plaintiffs and Mr. Starkey have already complied with defendants' discovery requests, plaintiffs and Mr. Starkey are in compliance with the Special Master's discovery order.

IT IS SO ORDERED.

DATED: April 27, 1990

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed August 13, 1991
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiff(s),

—v.—

ROBIN SCOTT, et al.,

Defendant(s).

RELIGIOUS TECHNOLOGY CENTER, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER DENYING PLAINTIFFS' MOTION FOR STAY

ORDER DENYING PLAINTIFFS' MOTION FOR REVIEW OF THE SPECIAL MASTER'S DISCOVERY ORDER DATED 7/25/90

IT IS HEREBY ORDERED:

1. Plaintiffs RELIGIOUS TECHNOLOGY CENTER, et al.'s (hereinafter "Plaintiffs") motion for a stay and suspension of

discovery and a stay of the objections to the Special Master's Discovery Order pending adjudication of motions for partial summary judgment is hereby DENIED.

2. Plaintiffs' motion for review of the Special Master's Discovery Order dated 7/25/90 is hereby DENIED.

3. Plaintiffs contend that discovery on the antitrust and authorship issues should be stayed and suspended until the summary judgment motions addressing the claims and defenses regarding those issues are resolved. They argue that discovery on those issues has been extensive and intrusive and promises to continue to be so. Plaintiffs assert that compliance with discovery requests and discovery orders regarding those issues now would be wasteful if summary judgment motions are granted and they claim that if the summary judgment motions are denied, the delay a stay would occasion would be minimal and discovery could continue from that point.

4. As to the motion for review of the Special Master's Order, Plaintiffs contend that Defendants have failed to demonstrate that the documents sought are relevant, that Defendants cannot get financial discovery for punitive damage claims, that Plaintiffs' financial records are specifically protected by California law, and that the Special Master's Order which permits discovery of financial records because of their alleged relevancy to Defendant's antitrust claims is not supported by fact or law.

In the present case, Plaintiffs have been extremely evasive with respect to their discovery obligations. This appears to be yet another tactic utilized by Plaintiffs to delay the progress of this case which was first filed in 1985. Moreover, Plaintiffs are already in violation of several Court Orders which have directed that Plaintiffs respond to Defendants' pending discovery requests. In fact, discovery responses by Plaintiffs in this case have either been incomplete or inadequate. In light of the foregoing, the Court hereby DENIES Plaintiffs' motion for a stay and the Court also hereby DENIES Plaintiffs' application for review of the Special Master's Discovery Order dated 7/25/90 and

hereby ORDERS the parties to comply with the discovery ordered by the Special Master.

IT IS SO ORDERED.

DATED: August 12, 1991

/s/ JAMES M. IDEMAN
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed February 24, 1993
CV-85-711-JMI (Bx)
CV-85-7197-JMI (Bx)

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

ROBIN SCOTT, an individual, et al.,

Defendants.

RELIGIOUS TECHNOLOGY CENTER,
a California corporation, et al.,

Plaintiffs,

—v.—

LARRY WOLLERSHEIM, an individual, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

ORDER GRANTING ATTORNEYS' FEES [~~PROPOSED~~]

DATE: March 1, 1993
TIME: To be submitted
CTRM: HON. JAMES M. IDEMAN

IT IS HEREBY ORDERED, as follows:

On July 31, 1992 the Court issued an order adopting the recommendation of the Special Master and dismissed Plaintiffs' Amended Complaints in these two consolidated actions. On August 31, 1992 Defendants filed a motion as the prevailing parties seeking attorneys' fees from Plaintiffs pursuant to 15 U.S.C. § 1117 (the Lanham Act); 17 U.S.C. § 505 (the Copyright Act), a written contract, dated January 27, 1982, (*see, e.g., Jones v. Drain*, 149 Cal.App.3d 484, 489, 196 Cal.Rptr. 827 (1983)) and as a result of Plaintiffs' misconduct in filing and prosecuting these actions in bad faith (*see, e.g., Chambers v. Nasco*, ___ U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

The Court has reviewed the Recommendation and Proposed Order of the Special Master to whom Defendants' Motion for Attorneys' Fees was referred in the first instance. For the reasons set forth herein, the Court adopts the Recommendation of the Special Master.

The Court reviewed the extensive documented record before it, including Plaintiffs' stated policy of using litigation as a weapon, the application of the Plaintiffs' "Fair Game" policy toward Defendants in this case, the Plaintiffs' objective of trying to obtain an unfair commercial advantage over Defendants by engaging them in litigation rather than allowing them to compete, Plaintiffs' document destruction and concealment, Plaintiff's refusal to comply with multiple court orders, which non-compliance was determined to be as a result of bad faith, willfulness or fault of the party, and the needless delay and multiplication of proceedings (covering over seven and one-half years) spawned by Plaintiffs' discovery stonewalling, the filing of frivolous motions, the filing of offensive and unreasonable motions and innumerable requests for interlocutory appeals. In addition, the Court notes a pattern of conduct by Plaintiffs which required the imposition of both non-monetary and monetary sanctions. As a result, the Court concludes that not only should Plaintiffs' be assessed attorney's fees for their bad faith litigation conduct, but also, these cases satisfy the requirement of the Lanham Act which permits the recovery of attorneys' fees in "exceptional cases", *Academy of Motion Picture Arts and*

Sciences v. Creative House Promotions, Inc., 944 F.2d 1446 (9th Cir. 1991), and of the Copyright Act, which in this Circuit has been construed to permit the recovery of attorneys' fees where there is a finding of "bad faith or frivolity" on the part of a plaintiff, *Cooling Systems and Flexibles v. Stuart Radiation*, 777 F.2d 485 (9th Cir. 1985). The Court also concludes that under California Law (see, Civil Code § 1717) Defendants are entitled to an award of attorneys' fees as the prevailing parties pursuant to contract.

The Court also has reviewed the declarations and exhibits submitted in support of Defendants' Motion (found by the Special Master to be complete, accurate, extensive and convincing) in order to determine the reasonableness of the attorneys' fees requested as required by *Hensley v. Eckerhart*, 461 U.S. 242, 103 S.Ct. 1922, 76 L.Ed.2d 40 (1983) and in so doing adopts the lodestar approach utilized by the Ninth Circuit. *See, e.g., Kim v. Fujikawa*, 871 F.2d 1427, 1434–1435 (9th Cir. 1989).

Defendants submitted detailed evidence based upon contemporaneously prepared time records of their attorneys substantiating 22,885.71 hours of billed time over a period of seven and one-half years at a value of $2,867,371.81. In addition, Defendants provided detailed reconstructed records for a limited number of records which had been lost for an additional 270 hours with a value of $28,399.01. Defendants properly redacted and did not bill for time and values for counter-claims.

The Court considered the novelty and complexity of the issues in these consolidated cases. As framed by Plaintiffs, these cases involved wide ranging federal (e.g., RICO, Lanham and Copyright) and pendent state (e.g., breach of contract, trade secret and other tort theory) causes of action. These cases involved multiple requests for injunctive relief, several published opinions from both the Ninth Circuit Court of Appeals and the District Court, including a decision of first impression in the Ninth Circuit upholding Defendants' contention that injunctive relief was not available to a private litigant in a RICO action.

The complexity and volume of issues raised in these proceedings, in part reflected by a court file well in excess of 100 volumes, imposed a demand upon the Court which was further aggravated by Plaintiffs' litigation misconduct. As a result, it was necessary to appoint a Special Master to oversee pre-trial activity in these cases.

The Court finds that Defendants were represented by able counsel who conducted the defense of this case in a reasonable manner taking into account both the size and scope of the litigation as well as the bad faith litigation practices employed by Plaintiffs. Defendants' counsel initially were confronted with demands for over $2.0 million, plus punitive damages and permanent injunctive relief, yet secured for Defendants a dismissal of all of Plaintiffs' claims in their entirety.

Taking into account the time and labor required, the novelty and complexity of the issues, the skill and expertise of counsel, the amounts involved and the result obtained, the Court concludes that the hourly fees charged (the record reflects that Defendants' primary counsel charged lower rates than Plaintiffs' primary counsel for work on this case) and the total amount of time incurred were reasonable. Accordingly, the Special Master's Recommendations are hereby adopted, Defendants' Motion is GRANTED and the Court awards to Defendants' attorneys' fees incurred in the defense of these consolidated matters in the amount of $2, 895, 710.82.

IT IS SO ORDERED.

DATED: February 24, 1991

/s/ JAMES M. IDEMAN
Hon. James M. Ideman
United States District Judge

Submitted By:

LAW OFFICES OF JEROLD FAGELBAUM
BRIGHT & POWELL

BY: JEROLD FAGELBAUM
Jerold Fagelbaum
Attorneys For Defendants DAVID MAYO, CHURCH OF THE NEW CIVILIZATION, JOHN NELSON, HARVEY HABER, VIVIEN ZEGEL AND DEDE REISDORF